Supreme Court, U.S.
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No. 98-608

In The

Supreme Court of the United States

October Term, 1998

CLEO JONES, *et al.*,
&
FRANCIS PATRICK NORWOOD, *et al.*,
&
JAY OTIS McKELLIPS, *et al.*,
&
JERRY PAUL TERRY, *et al.*,

Petitioners,

vs.

GEORGIA PACIFIC CORPORATION, *et al.*,

Respondents.

[Four Cases]

On Petition For Writ Of Certiorari Or, In The Alternative, Writ Of Mandamus And/Or Prohibition To The United States Court of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT GENERAL MOTORS CORPORATION

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QUESTION PRESENTED

Whether Compelling Reasons Exist for this Court to Grant a Writ of Certiorari for the Purpose of Interpreting the Fraudulent Joinder Exception Applicable to 28 U.S.C. § 1441(b) Even Though the Lower Courts Correctly Determined that the Cases Were Properly Removed to Federal Court Based on Legal Principles Consistent with Decisions of This Court and of Other Circuit Courts.

RULE 29.6 STATEMENT

In accordance with Sup. Ct. R. 29.6, General Motors Corporation certifies that it has no parent company. The following are nonwholly owned subsidiaries of General Motors Corporation:

American Mobile Satellite Corporation
Detroit Diesel Corp.
Fiem Sung
Nippon Avionics Co. Ltd.
PanAm Sat Corporation
Suzuki Motor Corporation

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STATEMENT OF THE CASE

Petitioners originally filed these four asbestos cases in the Superior Court of Fulton County, Georgia. Each case involves ten to thirteen plaintiffs and thirty-nine to forty-two defendants. In each case, there is no dispute that the requirements of diversity jurisdiction are met. All plaintiffs are of diverse citizenship from all defendants, and the amount in controversy exceeds the statutory minimum. Thus, the only barrier to removal of these cases was the fact that Georgia Pacific Corporation ("Georgia Pacific"), one of the defendants named in each case, is a resident of Georgia.

Petitioners' complaints did not specify the factual basis of any claim against Georgia Pacific. *See* Appendix E to Petition. General Motors Corporation ("General Motors") recognized that if there were no existing factual basis for a claim, Georgia Pacific had been improperly joined and the cases could be removed. General Motors served interrogatories asking one plaintiff in each case to specify the basis of the claims against Georgia Pacific. *See* Appendix to Petition at F-19 to F-25. Petitioners' interrogatory responses failed to provide any factual basis for any claim against Georgia Pacific. *Id.* Based on this evidence of fraudulent joinder, General Motors, with the consent of its codefendants, removed these cases to the Northern District of Georgia. *See* Appendix to Petition at F-1 to F-18.

Petitioners filed motions to remand each case. The district court denied these motions, finding that Georgia Pacific had been fraudulently joined because of the complete absence of specific factual allegations supporting claims against Georgia Pacific. *See* Appendix A to Petition. In its ruling, the district court properly applied the standard for determining fraudulent joinder, which looks to the facts contained in the record to determine if those facts can possibly state a valid claim under the relevant state substantive law. *Id.*

Petitioners filed motions for reconsideration. Along with their motions for reconsideration, petitioners submitted new materials which they claimed substantiated their claims against Georgia Pacific. The district court refused to consider the new materials because petitioners failed to establish that the materials could not have been obtained earlier. *See* Appendix B to Petition. Because there was no legal basis for changing its fraudulent joinder ruling, the district court denied the motions for reconsideration. *See id.*

Petitioners then filed a petition for writ of mandamus in the Eleventh Circuit Court of Appeals. The Eleventh Circuit denied the petition outright. *See* Appendix C to Petition.

REASONS FOR DENYING THE WRIT

Petitioners have failed to demonstrate any reason — much less "compelling reasons" — for this Court to grant a writ of certiorari in these cases. *See* Sup. Ct. R. 10. Petitioners' preference in litigating in a state forum, rather than a federal one, is insufficient to justify the grant of a writ of certiorari. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (stating that "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties"). Additionally, petitioners have attempted to create a conflict of authority where none exists. The district court's methodology, affirmed by the Eleventh Circuit, is consistent with this Court's precedent and with the standards applied in other circuits. The lower courts correctly applied well-settled principles of law, and review by this Court is not warranted.

I.

THERE IS NO SPLIT OF AUTHORITY REGARDING FRAUDULENT JOINDER ANALYSIS.

Petitioners do not even attempt to assert that there is a split of authority as to the applicable standards for fraudulent joinder. It is well-settled that a plaintiff cannot prevent removal of a case by fraudulently joining a non-diverse or resident defendant, and that a defendant is fraudulently joined when there is: (a) outright fraud in pleading jurisdictional facts; or (b) no possibility that the plaintiff can establish a cause of action against the resident defendant. *E.g.*, *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1998); *Rodriguez v. Sabatino*, 120 F.3d 589, 591 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1511 (1998); *Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1997); *Hoosier Energy Rural Elec. Coop., Inc. v. Amoco Tax Leasing IV Corp.*, 34 F.3d 1310, 1315 (7th Cir. 1994). The majority of fraudulent joinder cases involve the "no possibility" standard. *E.g.*, *AIDS Counseling and Testing Ctrs. v. Group W Television, Inc.*, 903 F.2d 1000, 1004 (4th Cir. 1990); *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987); *Smoot v. Chicago, Rock Island and Pacific R.R. Co.*, 378 F.2d 879, 882 (10th Cir. 1967).

Petitioners assert that there is a split of authority regarding "piercing the pleadings" to determine whether a party has been fraudulently joined, yet fail to establish that the review of materials outside the pleadings conducted in these cases conflicts with this Court's precedent or that there is any split of authority among the circuit courts as to this issue.

A. Piercing The Pleadings In Fraudulent Joinder Analysis Is Consistent With This Court's Precedent.

Petitioners concede that this Court expressly sanctioned the use of materials outside the pleadings to determine whether a resident defendant has been fraudulently joined in *Morris v. Gilmer*, 129 U.S. 315 (1889) and in *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176 (1907). In an attempt to create a split of authority where none exists, petitioners assert that courts have expanded their fraudulent joinder analysis and piercing of the pleadings in order to turn the fraudulent joinder analysis into a determination of the likelihood of a plaintiff's eventual success on the merits. Petitioners cite only one case for this proposition — *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98 (5th Cir. 1990), *cert. denied*, 498 U.S. 817 (1990). The *Carriere* opinion does not help petitioners' argument. In *Carriere*, the Fifth Circuit did not evaluate whether the plaintiff had a strong or weak claim, but instead found that the materials submitted established that, as a matter of law, the plaintiff had no possibility of recovering against the non-diverse defendants. *Id.* at 101-02. In fact, the *Carriere* opinion explicitly warned against the type of "pretrying" of the merits alleged by petitioners. *Id.* at 100 ("We have frequently cautioned the district courts against pretrying a case to determine removal jurisdiction").

Other cases similarly recognize that fraudulent joinder analysis should not be based on a prediction as to how likely it is that a plaintiff will ultimately prevail. *See Burden v. General Dynamics Corp.*, 60 F.3d 213, 216 (5th Cir. 1995) (stating that "[w]e do not determine whether the plaintiff will actually or even probably prevail on the merits of the claim, but look only for the possibility that the plaintiff might do so."). Simply put, the lower courts have not expanded fraudulent joinder analysis so as to conflict with this Court's precedent.

B. There Is No Conflict Among The Circuit Courts With Regard To Piercing The Pleadings.

Petitioners also assert that the standards and procedures applied by various federal courts to determine whether a party has been fraudulently joined are conflicting, and present *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir. 1990), *cert. denied*, 498 U.S. 817 (1990), and *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 112 (3d Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991), as a split of authority on this issue. These cases do not establish the sort of "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals" that would justify issuance of a writ of certiorari. *Layne & Bowler*, 261 U.S. at 393.

First, there is no direct conflict between *Boyer* and *Carriere* on the use of materials outside the pleadings in a fraudulent joinder analysis because the *Boyer* decision does not reject the use of materials outside the pleadings. The Third Circuit did not take a position on the piercing issue, but rather held that "[a]ssuming some piercing is appropriate to decide whether plaintiffs have asserted a 'colorable' ground supporting the claim against the joined defendant," that inquiry should not extend to the merits of the claim against the resident defendant. *Boyer*, 913 F.2d at 112. Thus, the Third Circuit is not inconsistent with the Fifth Circuit and the other Circuit Courts which expressly authorize piercing. *See, e.g.*, *Pampillonia*, 138 F.3d at 461 (Second Circuit authorizes piercing); *McCabe*, 811 F.2d at 1339 (Ninth Circuit authorizes piercing); *Crowe*, 113 F.3d at 1538 (Eleventh Circuit authorizes piercing); *Faucett v. Ingersoll-Rand Mining & Mach. Co.*, 960 F.2d 653, 655 (7th Cir. 1992); *AIDS Counseling and Testing Ctrs*, 903 F.2d at 1004 (Fourth Circuit authorizes piercing); *Dodd v. Fawcett Publications, Inc.*, 329 F.2d 82, 85 (10th Cir. 1964).

Moreover, *Boyer* and *Carriere* actually provide consistent guidance as to the type of inquiry a district court should make in a fraudulent joinder analysis. In *Boyer*, the Third Circuit reversed and remanded a district court decision because the district court had converted its inquiry as to whether the plaintiff had a possibility of stating a claim against the resident defendants into an evaluation of the merits of the claim. *Boyer*, 913 F.2d at 112. The inquiry into the ultimate likelihood of success on the merits which the Third Circuit rejected in *Boyer* is exactly the type of "pretrying" which the Fifth Circuit warned against in *Carriere*, 893 F.2d at 100.

Contrary to petitioners' assertions, proper application of the clearly established rules regarding "piercing the pleadings" does not result in a pre-judgment of the merits of a plaintiff's claim.[1] Rather than piercing the pleadings to determine how likely it is that a plaintiff will recover, courts use extrinsic materials to determine if it is possible for a plaintiff to maintain a claim. If, as a matter of law, there is no possibility that a plaintiff could maintain a claim against the resident defendant, that defendant is fraudulently joined. *E.g.*, *Rodriguez*, 120 F.3d at 592 (finding fraudulent joinder because non-diverse defendant owed no legal duty to victim and, as a matter of law, negligence claim cannot exist in absence of duty); *Hoosier Energy Rural Elec. Coop., Inc.*, 34 F.3d at 1316 (finding fraudulent joinder because non-recourse provision of contract precluded claims against non-diverse defendant); *Kepler v.*

1. Courts do not always find it necessary to pierce the pleadings to determine whether a defendant has been fraudulently joined. *See Dodd*, 329 F.2d at 85 (stating that "[i]n many cases, removability can be determined by the original pleadings" but that piercing is required in other situations); *see also Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998) (discussing a prior Ninth Circuit decision which was decided on the basis of the complaint alone and stating that the court would have considered extrinsic materials if those facts had been required to decide the issue).

C.G.F. Helmets, Inc., No. Civ. A. 98-1678, 1998 WL 690983, at *2 (E.D. La. October 2, 1998) (non-diverse defendant which did not manufacture or distribute allegedly defective product could not, as a matter of law, be held liable and was therefore fraudulently joined); *Veugeler v. General Motors Corp.*, No. 96 C 7278, 1997 WL 160749, at *3 (N.D. Ill. April 2, 1997) (plaintiff had no possible products liability claim against non-diverse defendant which did not supply allegedly defective airbags or any component parts).

C. Petitioners' Suggested Approach To Fraudulent Joinder Analysis Is Not Consistent With The Relevant Authority.

Ignoring the well-established analytical framework discussed above, petitioners urge this Court to apply a new approach which would prevent removal not only if a complaint properly stated a claim, but also if a complaint might state a claim under different governing substantive law or might state a claim given different factual allegations. Although petitioners claim to have "synthesized" this approach from the relevant caselaw, they cite absolutely no authority for the ridiculous proposition that a plaintiff, simply by asserting claims which lack legal or factual basis, may foreclose a defendant's right to remove a case to federal court.

Petitioners' suggested approach might be saluted for creativity, but it is contrary to well-established authority and would make for bad procedural policy. The ultimate question in fraudulent joinder analysis is whether the plaintiff can possibly state a claim against the non-diverse or resident defendant. This question is to be determined by evaluating the particular set of facts alleged by the plaintiff against the relevant substantive law. *Cavallini v. State Farm Mut. Ins. Co.*, 44 F.3d 256, 259 (5th Cir. 1995); *see also Cabalceta v. Standard Fruit*

Co., 883 F.2d 1553, 1562 (11th Cir. 1989) (reversing fraudulent joinder finding made under Florida law because Costa Rican law applied to claim). Having failed to satisfy the existing legal standard, petitioners ask this Court to add a new standard. This Court should refuse to do so.

Petitioners' suggested approach would shift the focus of the fraudulent joinder analysis from the specific facts presented in a case to some hypothetical set of facts that is not present. This idea has been specifically considered and rejected by the Seventh Circuit. In *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 74 (7th Cir. 1992), the plaintiff attempted to avoid a finding of fraudulent joinder based on the argument that "some facts might turn up to support a claim" against the non-diverse defendant. The Seventh Circuit correctly rejected this argument, stating that "only [the plaintiff's] present allegations count" because otherwise a plaintiff "could defeat diversity jurisdiction by joining his grandmother as a defendant — surely some set of facts might make her liable." *Id.* The approach advocated by petitioners would allow exactly the kind of theoretical pleading rejected by the Seventh Circuit and would effectively preclude defendants from ever exercising their right to remove cases to federal court.

II.

THE DISTRICT COURT PROPERLY DECIDED THE FRAUDULENT JOINDER ISSUE IN THESE CASES.

A. The District Court Properly Tested The Entire Record Against The Applicable State Law Standards.

In determining that Georgia Pacific had been fraudulently joined in these cases, the district court properly applied the correct legal standards and determined that the facts presented

could not establish viable causes of action under the relevant substantive law. The district court first looked to petitioners' complaints for factual allegations which might support claims against Georgia Pacific. The complaints predominantly used generic references to "Plaintiffs" and "Defendants." When naming General Motors as a defendant, however, each complaint stated that "Only Plaintiff CLAUDE MORRIS PIKE [or Fauver, Wilson, or McGinnis] is bringing claims herein against Defendant GENERAL MOTORS CORPORATION." *See* Appendix to Petition E1-E43. These vague, conflicting, and confusing allegations made it impossible to determine from the complaint which plaintiffs were asserting claims against which defendants, much less what the basis for each of those claims was.

Because the existence of a possible cause of action could not be determined based on the complaint alone, the district court turned to the petitioners' interrogatory responses. General Motors had propounded straightforward interrogatories, which requested petitioners to state whether they had a claim against Georgia-Pacific, and, if so, to identify the nature of the claims and the basic supporting facts regarding product exposure. *See* Appendix to Petition F19-F23.

Petitioners' responses first referred General Motors back to "the original complaint and any supplements and/or responses thereto." *Id.* Next, the responses baldly asserted that "[a]ll the named plaintiffs in this suit are bringing claims against Georgia Pacific Corporation." *Id.* As the apparent basis for this statement, the interrogatory responses referenced "supplemental discovery responses filed or to be filed in this case" and "deposition testimony given or to be given in this case." *Id.* The supplements and/or amendments to the complaint and the deposition testimony referenced in these responses did not exist. Thus, the complete record consisted of the complaints and interrogatory responses.

The record contained no factual allegations which, if true, would support the possibility of products liability or conspiracy claims against Georgia-Pacific.

1. The Facts Presented In The Complaint And Interrogatory Responses Could Not Possibly State A Products Liability Claim Against Georgia Pacific.

The district court properly determined that petitioners had no possibility of stating a products liability claim against Georgia Pacific because the record contain no specific facts or allegations regarding any particular plaintiff's exposure to Georgia Pacific products. It is a "fundamental proposition . . . that evidence of exposure to a particular defendant's product is a predicate to recovery" in an asbestos case. *Lowie v. Raymark Indus., Inc.*, 676 F. Supp. 1214, 1216 (S.D. Ga. 1987); *see also Strickland v. Royal Lubricant Co., Inc.*, 911 F. Supp. 1460, 1470 (M.D. Ala. 1995) (under Alabama law, "product identification is an element of causation and a 'threshold requirement' in any products liability case").[2]

Thus, as a matter of law, petitioners cannot have valid products liability claims against Georgia Pacific in the absence of specific factual allegations regarding exposure to Georgia Pacific products. *Lowie*, 676 F. Supp. at 1216; *Strickland*, 911 F. Supp. at 1470. Petitioners' complaints and interrogatory responses contained no such information, and the district court properly denied the motions to remand.

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2. The complaints failed to provide enough information for the district court to determine what state's substantive law, but under either the law of Georgia (the forum state) or Alabama (the state where all of the petitioners reside and where, presumably, the alleged tort and resulting injury occurred), the result is the same.

2. The Facts Presented In The Complaint And Interrogatory Responses Could Not Possibly State A Conspiracy Claim Against Georgia Pacific.

The district court properly found that petitioners had no possibility of stating a conspiracy claim against Georgia Pacific because there were no facts establishing an underlying tort. "[C]onspiracy of itself furnishes no cause of action." *Savannah College of Art and Design, Inc. v. School of Visual Arts, Inc.*, 464 S.E. 2d 895, 896 (Ga. Ct. App. 1995). Instead, the "gist of the action, if a cause of action exists, is not the conspiracy alleged, but the tort committed against the plaintiff and the resulting damage." *Id.*; *see also Barber v. Business Prods. Ctr., Inc.*, 677 So. 2d 223 (Ala. 1996) (holding that, if action alleged to constitute underlying wrong provides no cause of action, then neither does conspiracy itself). In the absence of an underlying tort, there is no possibility of establishing a cause of action for conspiracy. *See, e.g., Phillips v. General Elec. Co.*, 881 F. Supp. 1553 (M.D. Ala. 1995) (dismissing conspiracy claim because plaintiffs failed to come forward with viable underlying cause of action).

Although plaintiffs' conspiracy allegations contained various vague and conclusory references to misrepresentations, concealment, and false statements, plaintiffs did not allege any specific facts, and thus failed to plead with sufficient particularity to make out a claim for conspiracy to commit fraud. *See, e.g., Lyons v. The American Tobacco Co.*, No. Civ. A. 96-0881-BH-S, 1997 WL 809677 at *5 (S.D. Ala. Sept. 30, 1997) ("If plaintiffs were unable at the time they formulated their complaint to set forth any specific factual allegations against the [resident] defendants upon which could be based any claim of fraud . . . , there can be no better admission of fraudulent joinder. . . ."); *In re Valujet, Inc. Sec. Litig.*, 984 F. Supp. 1472, 1477 (N.D. Ga. 1997).

Furthermore, plaintiffs' alternate theory — that Georgia Pacific somehow joined with certain unspecified other defendants to market a defective product — simply does not constitute a conspiracy. Indeed, "[l]ogic and case law dictate that [such a conspiracy] is a non sequitur." *Sonnenreich v. Philip Morris, Inc.*, 929 F. Supp. 416, 419 (S.D. Fla. 1996); *R.R.R. Ltd. Partnership v. Investguard Ltd., et al.*, 463 S.E. 2d 735, 736 (Ga. Ct. App. 1995); *see also In re American Continental Corp./ Lincoln Savings & Loan Sec. Litig.*, 794 F. Supp. 1424, 1439 (D. Ariz. 1992) ("the concept of secondary liability for negligence [is] inherently contradictory"); *Triplex Communications v. Riley*, 900 S.W. 2d 716, 719 n.2 (Tex. 1995) ("Given the requirement of specific intent, parties cannot engage in a civil conspiracy to be negligent."). Thus, because plaintiffs provided no basis in fact or law to support their conspiracy allegations against Georgia Pacific, the district court was right to conclude that Georgia Pacific was fraudulently joined.

B. The District Court Was Not Required To Provide Petitioners With Additional Notice That The Interrogatory Responses Would Be Considered.

There is no basis for petitioners' claim that the district court erred by failing to provide additional notice that materials other than the complaint would be considered. The prior pleadings and the relevant caselaw provided clear notice as to the factual nature of the proceedings. First, General Motors' notices of removal explained in detail that the cases were being removed precisely because of petitioners' failure to provide any factual support for the claims against Georgia Pacific. *See* Appendix F. Equally important, petitioners are charged with the knowledge that the relevant law regarding fraudulent joinder provides that interrogatory responses and other materials may establish fraudulent joinder. *Anderson v. Worldwide Church of* God, 661 F. Supp. 1401, 1402-03 (D. Minn. 1987) (denying plaintiffs' motion

to remand because answers to interrogatories confirmed that plaintiffs had no colorable claim against non-diverse defendant); *see also Faucett v. Ingersoll-Rand Mining & Mach. Co.*, 960 F.2d 653, 654-55 (7th Cir. 1992) (affidavit demonstrating lack of claim against non-diverse defendant supported finding of fraudulent joinder).

C. General Motors Met Its Burden Of Proof.

General Motors bore the burden of proof regarding fraudulent joinder and satisfied its burden by submitting to the district court petitioners' complaint and interrogatory answers. As discussed above, the complaint and interrogatory responses demonstrated a complete absence of any specific factual allegations upon which a claim against Georgia Pacific might be based. As in the summary judgment context, a defendant may satisfy its burden of proof with regard to fraudulent joinder by pointing to the plaintiff's absence of evidence. *See, e.g., Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 262 (5th Cir. 1995) (finding fraudulent joinder where plaintiff failed to provide any facts giving rise to a special relationship between the parties because in the absence such a relationship, there can be no cause of action for breach of good faith and fair dealing); *Veugeler v. General Motors Corp.*, No. 96 C 7278, 1997 WL 160749, at *3 (N.D. Ill. Apr. 2, 1997) (finding fraudulent joinder because, as a matter of law, plaintiff cannot establish a products liability action against a defendant which was not involved in the design, manufacture, or distribution of the product); *Waters v. State Farm Mut. Ins. Co.*, 158 F.R.D. 107, 109 (S.D. Tex. 1994) ("[f]ailure to specify a factual basis for recovery against a non-diverse party constitutes a failure to state a claim and fraudulent joinder"). Thus, the district court did not improperly shift the burden of proof to petitioners in its analysis of the sufficiency of the claims against Georgia Pacific. Rather, General Motors satisfied its burden of proof by pointing

to the absence of critical allegations needed to state claims against Georgia Pacific.

Although petitioners attempt to justify the lack of factual support for their claims against Georgia Pacific by pointing to the early stage in the litigation, counsel for petitioners were required by Fed. R. Civ. P. 11 to have this basic information *before* filing any of these suits. *See Albright v. Upjohn Co.*, 788 F.2d 1217, 1221 (6th Cir. 1986) (naming all manufacturers of a certain drug as defendants violated Rule 11 when a reasonable inquiry would have disclosed the specific products to which plaintiff had been exposed). A plaintiff cannot avoid a finding of fraudulent joinder by claiming that it is possible that future discovery may reveal facts that might substantiate their claims. *See Pampillonia v. RJR Nabisco*, Inc., 138 F.3d 459, 462 n.5 (2d Cir. 1998); *Mosley v. Trinity Indus., Inc.*, No. Civ. A. 97-3468, 1998 WL 87626, at *3 (E.D. La. Feb. 19, 1998). In sum, petitioners failed in their complaints and interrogatory responses to provide any factual substantiation for the alleged claims against Georgia Pacific. As a result of petitioners' failure to demonstrate facts which would make it possible to state a claim under the relevant state law, the district court determined that Georgia Pacific had been fraudulently joined. The analysis employed by the district court comports with the relevant authority, and petitioners have no grounds for attacking the finding of fraudulent joinder.

III.

THE DISTRICT COURT DID NOT ERR IN ITS RULING ON PETITIONERS' MOTIONS FOR RECONSIDERATION.

Petitioners also assert that the district court erred in refusing to consider certain materials submitted with petitioners' motions for reconsideration. As a threshold matter, this decision was committed to the discretion of the district court. *Mays v. United States Postal Serv.*, 122 F.3d 43, 46 (11th Cir. 1997). A writ of mandamus is generally not an appropriate means by which to obtain review of a discretionary order, and a writ will issue in such an instance only if the trail court's action amount to "a clear abuse of discretion." *In re Ford*, 987 F.2d 334, 341 (6th Cir. 1992). Petitioners are not entitled to a writ of mandamus because there was no clear abuse of discretion.

The district court properly refused to consider the "evidence" attached to petitioners' motion for reconsideration because courts do not countenance unexcused, belated submission of facts which were otherwise available to be submitted upon the initial consideration of the matter. When a party attempts to introduce previously unsubmitted evidence on a motion for reconsideration, the motion should not be granted absent some showing that the evidence was not previously available. *Mays*, 122 F.3d at 46 (finding that district court correctly denied motion for reconsideration when there was no showing that affidavits could not have been submitted earlier).

In their motions for reconsideration, petitioners did not even allege, much less establish, that the work history and alleged product exposure information was not previously available. Not only should this information have been in the possession of petitioners' counsel prior to the filing of the

complaint, but it was improperly withheld in response to General Motors' discovery requests and was not provided in petitioners' motions to remand or reply briefs. This was not "new evidence," and the district court properly refused to consider it.

Although Petitioners claim that they were not aware that they were required to provide factual substantiation in their motion to remand, even a cursory review of Eleventh Circuit precedent would have informed counsel for petitioners that materials outside the pleadings would be considered. *E.g.*, *Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1997).

Petitioners' reliance on *Ford v. Elsbury*, 32 F.3d 931 (5th Cir. 1994), is misplaced. In *Ford*, the Fifth Circuit treated the plaintiff's "motion to reurge" as a motion to alter or amend judgment under Fed. R. Civ. P. 59(e). The Fifth Circuit distinguished motions brought pursuant to Rule 59(e) from those brought pursuant to Rule 60(b), and held that the Rule 60(b) requirement that the movant show that the materials submitted could not have been obtained earlier did not apply to Rule 59(e) motions. *Id.* at 937.

The Eleventh Circuit, however, makes no such distinction between Rule 59(e) and Rule 60(b) motions. The Eleventh Circuit requires that a party seeking to introduce previously unsubmitted evidence on a motion for reconsideration must show that the materials were not previously available. *Mays*, 122 F.3d at 46. Petitioners did not even attempt to make the showing required by the Eleventh Circuit, and the district court properly refused to consider the materials submitted along with petitioners' motions for reconsideration.

Moreover, even if the "Work History Sheets" submitted by petitioners along with their motions for reconsideration had been considered, these materials would not have affected the

decision regarding removal of this case. Removal jurisdiction and fraudulent joinder are determined at the time of removal. *Gould v. Artisoft, Inc.*, 1 F.3d 544, 547 (7th Cir. 1993) ("We look to the facts that existed at the time of removal to determine jurisdiction, for a plaintiff 'may not manipulate the process' to defeat federal jurisdiction and force a remand once the case has been properly removed.") (internal citations omitted); *Coughlin v. Nationwide Mut. Ins. Co.*, 776 F. Supp. 626, 628 (D. Mass. 1991) ("Fraudulent joinder exists when the complaint in effect at the time of removal states no claim against the non-diverse defendant.").

At best, the materials submitted by petitioners along with their motions for reconsideration constituted an unsubstantiated attempt, post-removal, to amend the complaint so as to add claims against Georgia-Pacific. Petitioners did not seek leave to amend, and even if they could have justified an amendment, *see, e.g.*, *Abramson v. Gonzalez*, 949 F.2d 1567, 1581 (11th Cir. 1992), their motions to remand and motions for reconsideration were properly denied because the post-removal addition of Georgia-Pacific would not have required remand. *See Lopez v. General Motors Corp.*, 697 F.2d 1328, 1332 (9th Cir. 1983) (after removal, amendment would not be allowed to add defendant which would destroy diversity); *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 262 (5th Cir. 1995) (finding fraudulent joinder where plaintiff failed to provide any facts giving rise to a special relationship between the parties because in the absence such a relationship, there can be no cause of action for breach of good faith and fair dealing); *Devore v. Transport Tech. Corp.*, 914 F. Supp. 355, 358-59 (W.D. Mo. 1996) (rejecting plaintiff's motion to remand despite post-removal addition of resident defendant); *Guillot v. Bellsouth Telecomm., Inc.*, 923 F. Supp. 112, 113 (W.D. La. 1996) (plaintiffs' post-removal amendment of complaint deleting all federal claims does not divest court of jurisdiction), *aff'd*, 100 F.3d 953 (5th Cir. 1996).

CONCLUSION

For the foregoing reasons, Respondent General Motors respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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